No. 91-2051

In The

Supreme Court of the United States

October Term, 1991

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF ON MERITS

MARK BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN P. GUHIN
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This brief addresses arguments made by the Tribe and the United States on the merits.[1] Many of the points made in the first thirty pages of the tribal brief are inaccurate or misleading, and appear to be designed to direct the attention of the Court from the legal issues before it.[2] Other points are simply irrelevant, or do not need to be addressed at all.

It is necessary, however, to address the argument of the Tribe that this case puts at issue only its power to license and not its power to *enforce* licensing. RB 17. The argument is without merit. The district court, *see* DCO JA 141-142, the court of appeals and indeed all of the parties until the filing of the Tribe's latest brief, have understood the State's argument to be that the Tribe could not subject a non-Indian to the jurisdiction of the Tribe's courts. Furthermore, the Question

---

[1] The notations "T" and "PHT" refer to the Trial Transcript and Preliminary Hearing Transcript, respectively. The notations "Ex." and "PH Ex." refer to Trial Exhibits and Preliminary Hearing Exhibits, respectively. In addition, the notation "PTA" followed by a letter or double letters refers to the Petitioner's four-volume Appendix to its Trial Brief below. *See* R 133. The notations "PB," "RB" and "USB" refer to the Petitioner's Brief, the Respondent's Brief and the federal brief on the merits, respectively. The notation "DCO" refers to the District Court Opinion of August 21, 1990. *See* JA 50.

[2] For example, the Tribe at RB 4 cites Art. 7, § 2 of its Bylaws as authorizing its council to pass hunting and fishing ordinances "not conflicting with any federal or state game laws [and] to cooperate with federal and state conservation efforts. . . . " At RB 13 and 20 n.26 it stresses its cooperation with the state. The Tribe neglects to add that Art. 7, § 2 was amended in a June 23, 1992, election and tribal ordinances *now* need only not conflict "with any of the federal game laws," and cooperation is required only "with federal authorities." (The amendment has been approved by Interior but the election at which this and other amendments were adopted is presently under challenge for, inter alia, noncompliance with the bilingual requirements of the Voting Rights Act. *Elk Nation v. Lujan*, Civ. No. 92-3039 (D.S.D.)).

Presented, i.e., whether the Tribe has the authority to "regulate" non-Indians, most certainly "fairly includes" the argument that the Tribe may not undertake the key action *necessary* for it to regulate – to subject the non-Indians to the jurisdiction of tribal courts. *See*, Supreme Court Rule 14.1(a).[3]

The Tribe also argues that no question as to the "scope of tribal court civil enforcement of hunting and fishing regulations" is at issue. RB 18. This statement is at odds, however, with the Tribe's stipulation to or introduction of regulations setting forth tribal civil fines and forfeiture procedures. *See* Ex. 7 and 8 (T 4); Ex. 13 (T 689, 705). Further, the content of the tribal civil penalty and forfeiture provisions which could be applied upon the federal taken area are at issue. The Tribe correctly argues that it has never "imposed severe or unfair penalties on non-Indian" violators. RB 18, *quoting* JA 19-20. Indeed, the evidence shows that it has never imposed *any penalties* on non-Indians for hunting and fishing violations prior to this litigation. Nonetheless, the *threat* of "draconian",

---

[3] The Tribe in a related argument urges that *United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989) held that violations of tribal hunting and fishing ordinances "on the taken areas of the Missouri River are subject to federal prosecution under the Lacey Act . . . without regard to whether the particular tribe itself could undertake enforcement in its own courts." RB 17, *see also* RB 33 n.39. This statement is mistaken as to the taken areas now at issue (and it is notable that the United States does not join in this tribal argument). *Big Eagle* (which involved non-member Indians, not non-Indians) was tied to a state-tribal agreement with the Lower Brule reservation. No such agreement is present here. *Big Eagle*, 881 F.2d at 541-542. The record also demonstrates that *Big Eagle* has *not* been applied by federal prosecutors to areas (including the Cheyenne River taken areas at issue here) other than those involved in the Lower Brule settlement. *See* T 569-570. Finally, the district court's views on *Big Eagle*, DCO JA 138-142, were explicitly labeled "dicta" by the circuit court. *South Dakota v. Bourland*, 949 F.2d 984, 996 (8th Cir. 1991); Pet. App. A-49-A-50. In any event, application of tribal law as a matter of federal Lacey Act law in the taken area at issue here would be problematic given the finding of the district court that the tribe "discriminates against nonmembers." DCO JA 80.

see RB 18, civil penalties and forfeitures make the provisions at issue relevant insofar as they remain within tribal ordinances. These regulations are a statement of intent.[4]

ARGUMENT ON THE MERITS

I. *MONTANA* AND *BRENDALE* CONTROL THIS QUESTION.

Montana and *Brendale* hold that the source of tribal power to regulate non-Indians must have its origin either in positive federal law such as treaty or in the inherent sovereignty of the Tribe.

A. The treaty power does not justify the exercise of civil regulatory jurisdiction over the taken area.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court considered treaty language which provided that particular land be set apart for the "*absolute and undisturbed use and occupation* of the Indians herein named. . . . " *Montana v. United States*, 450 U.S. at 558, *quoting* 15 Stat. 649 (emphasis in original). That treaty also provided that the United States agreed that no persons except those authorized by the treaty should be permitted to "pass over, settle upon, or reside in the territory. . . . " *Id.* According to *Montana*, this treaty language had the effect of "arguably"[5] conferring "upon the Tribe the authority to control fishing and hunting on those lands." *Montana*, 450 U.S. 458-459. This Court held, critically:

---

[4] The Eighth Circuit Court of Appeals did opine on the Tribe's power to discriminate against non-Indians, *Bourland*, 949 F.2d at 995, Pet. App. A-42-A-43, and it is thus incorrect to allege that this question is not at issue here. *See also*, for the State's comment on the concurrent jurisdiction issue, PB 28 n.21 and accompanying text.

[5] The State agrees with the State Amici that this treaty language does *not*, in fact, confer regulatory authority over non-Indians. *See*, Brief of Amici Curiae Montana, et al., p. 5-8. Such a claim is inconsistent with the purpose of the treaty to exclude; it also confuses the treaty granted property or landowner power with tribal sovereignty principles.

> But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."

450 U.S. at 559.

The unavoidable conclusion of *Montana* is that if the Tribe *cannot* exercise "absolute and undisturbed use and occupation" on particular lands, it no longer has the "arguable" authority to regulate hunting and fishing on those lands.

1. *Montana* means what it says.

The central argument of the United States and of the Tribe is that *Montana* does not mean what it says.[6] Both arguments focus on the meaning of footnote 9 and the motives underlying the Allotment Act. *See Montana*, 450 U.S. at 559 n.9; *see* USB 19, 20, 21; RB 46-47. Footnote 9, read in context, was apparently intended only to repudiate the argument of the lower court that the legislative history and motives underlying the Allotment Act somehow allowed the Tribe to exercise regulatory rights over non-Indians on allotted lands despite the fact that the Tribe no longer held "absolute and undisturbed use and occupation" of the lands. The footnote did not displace the square holding of *Montana* regarding "absolute and undisturbed use" and the consequences of the loss of such "absolute and undisturbed use."

---

[6] The cases relied upon by the Tribe and the United States do not undermine *Montana* and *Brendale*. Neither *Menominee Tribe v. United States*, 391 U.S. 404 (1968), nor *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), even addresses the issue now before the Court: tribal jurisdiction over non-Indians. Further, the holding of *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), is simply that the tribal court should ordinarily be given the first chance to resolve challenges to its jurisdiction when a case has been brought before it. *See, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 427 n.10 (1989) (White, J.). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) distinguishes itself from *Montana* stating: "Unlike this case, *Montana* concerned lands located within the reservation but *not* owned by the Tribe or its members."

This interpretation of footnote 9 is supported by the last paragraph of the footnote itself which indicates that policy underlying the sale of land was not decisive. It states "what is relevant . . . is the *effect of the land alienation* occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." *Montana*, 450 U.S. at 559 n.9. (Emphasis added.)

Further, the lack of linkage between the motives underlying the Allotment Act and the loss of tribal jurisdiction is clear from the *Montana* treatment of the Big Horn River. In *Montana*, the Court relied upon the equal footing doctrine and not the General Allotment Act to determine the Tribe did not own the bed of the Big Horn River. Nonetheless, although this river ran through the heart of the reservation, the Court assuredly rejected the "Tribe's contention that it was entitled to regulate fishing and duck hunting in the river based upon a purported ownership interest." *Brendale*, 492 U.S. at 443 (Stevens, J.). This was so even though the doctrine relied upon to reject the Tribe's claim of ownership, the equal footing doctrine, did not have destruction of tribal government as an important objective. Thus, *Montana* itself repudiates the thesis that its jurisdictional doctrine applies only in the context of a General Allotment Act case.[7]

2. The *Brendale* plurality confirms the *Montana* treaty analysis.

The *Brendale* plurality first cites the treaty with the Yakimas which provides that certain lands were set apart "for the exclusive use and benefit" of the Tribe. *Brendale*, 492

---

[7] To the extent that motives *are* important, it is noted that just as the framers of the Allotment Act looked to the ultimate termination of tribal government, so did Congress, the Tribe and the BIA perceive that the termination of the Cheyenne River Sioux tribal government could easily come within 10 or 15 years of the taking legislation at issue here. PB 31-33. In fact, the congressional payments for the taking were intended to place the Indians "in shape" for termination of federal supervision. 100 Cong. Rec. 13,160 (Aug. 3, 1954), JA 226, PTA PP.

U.S. at 422. The Tribe contended that its treaty power to exclude provided authority over the land. The plurality rejected the argument:

> We disagree. The Yakima Nation no longer retains the "exclusive use and benefit" of all the land within the reservation. . . .

492 U.S. at 422. The plurality does, of course, cite the General Allotment Act language of *Montana*, but continues to decisively characterize *Montana* as rejecting a treaty based power to regulate in the absence of a power to exclude. According to the *Brendale* plurality, the *Montana* court

> flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude non-members.

492 U.S. at 424. The essence of *Montana* and *Brendale* is that a treaty power to regulate is grounded in the power to exclude. When that power to exclude is lost, so is any lesser included power to regulate. Because it is clear under § 4 of the Flood Control Act of 1944 and § X of the 1954 Cheyenne River Act, that the Tribe can no longer exclude nonmembers from the taken area,[8] *see*, PB 22-23, it follows, under *Montana* and the *Brendale* plurality, that any treaty power the Tribe might have previously had to regulate non-Indians within the area has been lost.

---

[8] The United States, consistent with the ruling of the Court of Appeals, *Bourland*, 949 F.2d at 995, Pet. App. A-42, concedes that the Tribe is not free to entirely exclude non-Indians from the taken area. *See also Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 826 (8th Cir. 1983). The Tribe in its Opposition to Petition for Writ of Certiorari, p. 19, admitted that its rights to "exclude" had been modified. Earlier, the tribal president testified that the Tribe could open the federal taken area to tribal hunting and fishing and close it to non-Indians. T 549-550.

B. Inherent sovereign powers.

The inherent sovereignty of the Tribe is also a theoretical basis for the assertion of tribal regulatory power. The *Brendale* plurality, 492 U.S. at 427, *quoting United States v. Wheeler*, 435 U.S. 313, 326 (1978), defines the Tribe's external relations to be the " 'relations between an Indian tribe and nonmembers of the Tribe,' " and finds that "tribal sovereignty over such matters of 'external relations' is divested." No legitimate claim may therefore be made, consistent with the *Brendale* plurality, and *Montana*, 450 U.S. at 564, that the inherent sovereignty of the Tribe justifies the exercise of jurisdiction over non-Indians.

1. The federal attempt to redefine the term "external relations"

Given this conceptual difficulty, the United States seeks to redefine the term "external relations" so as to be more malleable. USB 26. This attempt should be rejected. According to the current federal position, the Tribe's "external relations" are implicated if the nonmember has a "reasonable expectation" that he would not be subject to tribal jurisdiction. USB 26. The United States then argues that the relationship between the Tribe and "transient hunters and fishers" is not one of "external" but is one of "internal" relations, *see* USB 27, apparently because the nonmembers, as mere transient hunters and fishers, should "reasonably expect," they would be subject to tribal jurisdiction.

But given South Dakota's development of a nationally known fishery, DCO JA 78, nonmembers residing *on* the Cheyenne River Reservation surely do hunt and fish in the taken area. *See* Ex. 101, p. 15. (Approximately 19% of all South Dakota resident fishing licenses are sold in counties adjacent to the Missouri River reservoirs). Moreover, any American citizen is entitled to a "reasonable expectation" that his activities on federal lands and waters will not be subjected to the jurisdiction of a nondemocratic system whose courts are "often 'subordinate to the political branches of tribal governments' " and whose "legal methods may depend on

'unspoken practices and norms.' " *Duro v. Reina*, 495 U.S. 676, 693 (1990).

Finally, notwithstanding the argument of the United States, USB 26, it *is* inconsistent with the Tribe's status to allow it jurisdiction over non-Indians on the federal taken area. *See, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204, 208 (1978). In the words of the Tribe, these lands were acquired "*not to benefit the Tribe* but for the United States' own reservoir project. . . . " RB 28. (Emphasis added.)

2. The protection of tribal self-government and the welfare of the Tribe do not justify tribal jurisdiction in this case.

In any event, even if the inherent sovereignty of the Tribe might, in some cases, justify tribal jurisdiction on the basis of harm to self-government, internal relations or welfare of the Tribe, *see Montana*, 450 U.S. at 564-565, that is not the case here. As the district court held, the Tribe

> need not regulate the hunting and fishing activities of nonmembers on the taking area . . . to protect its political integrity, economic security, or health or welfare.

DCO JA 81-82. *See also* DCO JA 148-149.[9] These findings also dispose of any related claim that the *Montana* "second exception" could apply here to give rise to tribal jurisdiction. *See Montana*, 450 U.S. at 566. (The *Brendale* plurality found that the *Montana* "second exception" factors could constitute a "protectible interest" giving rise to a cause of action only in federal and state, and not tribal, forums. *Brendale*, 492 U.S. at 430-31 (White, J.). *See County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 692 (1992), *citing* the *Brendale* plurality's concept of "protectible interest.")[10]

[9] The court also found that the "taken area and fee lands are not substantial food sources for tribal members," DCO JA 70, that "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes," DCO JA 70, and that "[t]ribal regulation of nonmember hunting on the taken area . . . is not necessary to protect hunting by tribal members for subsistence purposes." DCO JA 68.

II. ASSUMING APPLICATION OF *UNITED STATES V. DION* AND SIMILAR CASES, THE RESULT IS THAT THE TRIBE MAY NOT EXERCISE CIVIL REGULATORY JURISDICTION OVER NON-INDIANS ON THE TAKEN AREA.

The court of appeals below and the United States here rely upon *United States v. Dion*, 476 U.S. 734 (1986) as the linchpin of their legal analysis even though *Montana* and the *Brendale* plurality provide the appropriate rule. *See* PB 35-37.

In any event, *Dion* supports the State's position. *Dion* considered a statute which forbade the taking of eagles generally but which authorized the Secretary of the Interior to permit the taking of eagles "for the religious purposes of Indian tribes." 476 U.S. at 740. This Court found that the exception to the Act allowing the Secretary of the Interior to permit the taking of eagles for religious purposes, along with the legislative history of the Act, constituted "clear evidence" that Congress considered the conflict between the treaty right to hunt eagles and its intended action and resolved the issue against the Tribe. *Dion*, 476 U.S. at 740.

A. The plain language of the 1954 Taking Act, read in context, leaves the Tribe with access only, not jurisdiction over non-Indians on the taken area.

The same follows here from the plain language of Section X of the 1954 Cheyenne River Taking Act, Pub. L. No. 776, 68 Stat. 1191 (1954), Pet. App. A-205, JA 243-244, which provides:

[10] The federal and tribal attempt to read *Yakima* as justifying a broad view of tribal jurisdiction is unavailing given its reference to the "very narrow powers reserved to tribes over the conduct of non-Indians within their reservations." *Yakima*, 112 S.Ct. at 692.

> The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

The congressional specification of a limited right of "access" to "hunt and fish" in the taken area which is itself "subject . . . to regulations governing the corresponding use by other citizens of the United States' " when read in context, PB 40-47, constitutes the requisite "clear evidence" under *Dion* of a congressional choice to divest the Tribe of any arguably preexisting right to regulate others in the same taken area.[11]

B. The Tribe and the United States slight the language of Section X and misconstrue the legislative history and context of the 1954 Taking Act.

1. The tribal approach to Section X.

The Tribe appears to argue, RB 28-29, that principles of contract apply to this case. Assuming application of such principles, the obvious effect of the "access" language of Section X was simply to create or reserve a contractual easement in the Tribe and not to create or reserve in the Tribe regulatory power over others.

The Tribe also argues that the use of the term "tribal council" within Section X indicates that the right to regulate non-Indians was somehow retained. RB 40. The plain meaning of this language, however, merely is that a tribal government's fishing enterprise could have "access" without cost but

---

[11] The same result follows under the Tribe's more general approach based on the canons of construction. *See, e.g.*, the "fair appraisal" language of *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985).

that in so doing, it would be subject to laws governing the "corresponding use by other citizens of the United States."[12]

2. The United States essentially ignores the plain meaning of Section X.

The federal response to the language of Section X is essentially to ignore its plain meaning and to propose that recognizing tribal civil regulatory jurisdiction over the former trust lands would constitute an "appropriate means" for the Tribe to protect its grazing interests. USB 16-17. The district court, however, squarely rejected the claim that tribal regulation was necessary to protect these interests. DCO JA 71, 148. *See also* T 519, JA 377: (Tribe takes no responsibility for "monitoring the [grazing] permits.")

3. The context and legislative history of the Cheyenne River Act of 1954 do not call for a different result.

The heart of the argument of Tribe is that the context and legislative history of the Cheyenne River Act preclude a finding that Section X should be given its plain meaning. In particular, the Tribe alleges[13] that it regularly exercised licensing authority over non-Indians at least on trust lands

---

[12] Two of the other taking acts on the Missouri River in South Dakota provide that the "*tribe* and members" (and not the "*tribal council*") should have access for hunting and fishing. *See* Pub. L. No. 87-735; 76 Stat. 704, 707 (1962) (Crow Creek-Big Bend); Pub. L. No. 87-734, 76 Stat. 698, 701 (1962) (Lower Brule-Big Bend). Language in taken area legislation also indiscriminately refers to either a "right to hunt and fish" or "permission to hunt and fish." Contrast, *id.*; with Pub. L. No. 85-923, 72 Stat. 1773, 1774 (1958) (Lower Brule – Fort Randall). The Tribe's reliance upon isolated words is, in this context, inappropriate.

[13] The parties also base an argument on the tribal interest in land remaining after the taking. This argument has been met through a demonstration of the minimal nature of that interest, PB 34-35, and the lack of necessity for tribal court jurisdiction to safeguard that interest. *See* DCO JA 81-82, 148-149.

prior to 1954; that this licensing generated a pre-taking "revenue stream" (the phrase apparently being created for this appeal); that Congress did not separately compensate the Tribe for the loss of the alleged "revenue stream"; and that, therefore, the Congress cannot possibly have intended to deprive the Tribe of that "revenue stream." This is confirmed, according to the argument of the Tribe, by the supposed regular exercise of licensing jurisdiction on the taken area up to the present. These arguments are not sustained by the evidence in the record.[14]

Moreover, it should be noted that much of the pre-taking era evidence relied upon by the Tribe is not particularly relevant to the legislative context because there is no showing that Congress was informed of it or had any particular interpretation of it. Likewise, the general findings of the District Court on the assertion and exercise of tribal jurisdiction, *see*, DCO JA 65-66, insofar as they are intended to apply to the pre-taking era, do not demonstrate what *Congress* perceived about the pre-taking context. In any event, as will be noted below, the actual state of the evidence does not support the Tribe's contentions.

a. The evidence of tribal licensing of non-Indians hunting on any lands on the reservation prior to 1954 is equivocal at best.

The Tribe engaged a professional historian, Professor Herbert Hoover, to "discover any instances during which the Cheyenne River Sioux Tribe exercised civil jurisdiction over

[14] It should also be noted that the map attached to Respondents' Brief is not, contrary to RB 11 n.14, a reproduction of Ex. 95 but has apparently been redesigned so as to enhance the tribal position by, for example, eliminating or truncating certain state highways and adding new material not in Ex. 95.

the behavior of non-Indians with the reservation." T 748. Hoover concentrated his scouring of the archives on the pre-taking era but failed to testify that any of the historical documents he produced at trial clearly demonstrated that any non-Indian had ever purchased a tribal license. *See* T 769-770.[15] Moreover, none of the Tribe's exhibits or testimony, including the Hoover testimony, indicates that any non-Indian had ever been subjected to the jurisdiction of the tribal court on a hunting or fishing violation prior to 1954, *see* T 770-771 (or, indeed, prior to this litigation in 1988. *See* T 517-518, JA 374-375; T 548-549, JA 380). *See Montana*, 450 U.S. at 562 n.11.

The Tribe relies heavily upon Tribal Ordinance No. 2 enacted in 1937, which appears to assert authority over any

[15] The Tribe has misconstrued several documents. Exhibit 93, at 16 (not "at 15", *see* RB 6) is cited for the proposition that the 1947 season was opened to "members and nonmembers." Exhibit 93 at 16, however, indicates only that there was a special season for "U.S. Indian Service employees of the Cheyenne River Agency." On cross-examination, Professor Hoover was unable to say that any non-Indian federal employees had actually purchased a tribal license. T 770. The Tribe also implies that Ex. 61 demonstrates that the Cheyenne River Tribe "derived considerable income from the sale of special [fishing] licenses and by serving as guides." *See* RB 25, *citing* JA 168-169. The section of the Exhibit referred to at JA 168-169 lists certain fishing related activities of Tribes in Minnesota and Wisconsin but there is no assertion that such activity took place on the Cheyenne River Reservation in South Dakota. Closed seasons on the Cheyenne River Reservation are noted in the same Exhibit, *see also*, Ex. 58 at 12, but it is not clear which entity actually closed them. *See* Ex. 51, (1938 reference to "State closed seasons" on South Dakota reservations.) Ex. 61 also describes a beaver trapping license system at Cheyenne River. JA 174-176. There is, however, no assertion of sales to non-Indians in the Exhibit and the skins needed a "state metal tag" to be legal. JA 175. Exhibit 58, a 1943 BIA report, does not, contrary to the implication of the Tribe, indicate that the Tribe exercised jurisdiction over non-Indians with regard to fishing. RB 4. To the contrary, the document states that the stocking of fish on the reservation had been performed by the "State Department of Game and Fish." Ex. 58 at 12. The same report indicates also that the *counties* of Dewey and Ziebach paid bounties on coyotes. *Id.*

"nonmember" with regard to hunting and fishing on the reservation. RB 4. The Tribe fails to quote Tribal Ordinance No. 3, enacted on the same day, which provides for the transfer of custody to federal or state law enforcement officers of "any person not subject to the jurisdiction of the Cheyenne River Sioux Indian Court. . . . " Ex. 3, JA 158. The 1937 ordinances thus do not constitute an unequivocal assertion of tribal jurisdiction over non-Indians.[16]

---

[16] The Tribe cites the Indian Reorganization Act of 1934 as endorsing an expansive view of tribal jurisdiction and confirming the Tribe's claim to jurisdiction here. *See* RB 23-25, 45, 49. Such an interpretation might have been appropriate had the IRA been enacted as proposed; in fact, the bill was almost completely changed from the original proposal. As introduced in 1934, legislation provided that an Indian community which wished to exercise governmental authority within an area would apply for a charter to the Secretary of the Interior and that the Secretary could thereafter "grant" to the community the power "over all other cases arising under the ordinances of the community, criminal and civil, legal and equitable. . . ." Hearings before the Committee on Indian Affairs, House of Representatives, 73rd Cong. 2d Sess. on HR 7902 (1934) p. 2. John Collier indicated that this section provided for tribal civil and criminal jurisdiction over non-Indians. *Id.* at 28, 80; *see also id.* at 80 (Statement of Felix Cohen, Assistant Solicitor). Collier proposed creation of a special court to provide for appeals from the local Indian court, *id.* at 12, and included within the bill specific guarantees of the "civil liberties of minorities and individuals within the community." *Id.* at 2. Nonetheless, there was furious opposition. Senator Wheeler stated that "it would bring about all kind of conflicts between your Indians and the white people. . . . " Hearings Before Committee on Indian Affairs, Senate, 73rd Cong. 2d Sess. on S. 2755 (1934) at 68. He stated, "you are going entirely too far at the present time in letting these tribes set up their rules and regulations, because they might conflict", *id.* at 199-200, and said that the bill was a "step backward." *Id.* at 200. Wheeler thus caused drastic amendment of the bill, *eliminating* the provisions allowing tribal jurisdiction over non-Indians. *See* 78 Cong. Rec. 11,123 (1934). The legislative history of the Indian Reorganization Act thus indicates a decisive congressional rejection of expansive tribal power over non-Indians on reservations. To allow Section 16 of the IRA to be cited as authority for the very powers *rejected* by Congress in the enactment of the principal bill, as suggested by the Tribe, defies logic. *See generally*, Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, University of Puget Sound Law Review 211 (1991). Finally, *Montana* itself rejected the argument that the IRA established or confirmed tribal civil regulatory jurisdiction over non-Indians. *See Montana*, 450 U.S. at 559 n.9.

To support its thesis of pre-taking licensing, the Tribe also relies on a statement of the tribal lawyer in a non-published hearing that white citizens must obtain "a license from the tribal council" before they go on the reservation "and hunt." Hearing of the Committee on Interior and Insular Affairs; Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate, Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on S. 695 (May 20, 1954) (hereinafter May 20, 1954, Hearing). Appendix RR 289, JA 214. The difficulty with this argument is that, beyond the bare assertion of the tribal lawyer, there is no evidence in the legislative record that this ever occurred, or that there was a licensing system applicable to non-Indians for hunting in place on the Cheyenne River Reservation at the time of the takings. Nor does this statement allege anything as to *fishing* on the Missouri River.[17]

---

[17] The Tribe also argues that the comment of the tribal lawyer discussed above made clear to Congress that a tribal power to license on the taken area would exist *after* the taking. *See, e.g.*, RB 39-40. However, the trial court found, and the court of appeals did not disturb, the finding that the comment of the tribal lawyer "was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were actually taken." DCO, JA 128-129. Furthermore, it is of note that the comment of the tribal lawyer specifically recognized that the right granted under the Section X is a "right of access" or a "right of free access," PTA RR at 289, JA 213; the tribal lawyer certainly knew that a right of "access" was not a right to regulate. *See generally, New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916).

b. The record does not support the existence of any "revenue stream" to the Tribe from licensing prior to or in 1954.

There is no evidence of the alleged pre-taking "revenue stream" from sale of hunting licenses to non-Indians for there was no concrete evidence of any such licenses being sold to non-Indians. Moreover, it is telling that the Tribe failed to request a finding on the *existence* or *amount* of an alleged pre-taking "revenue stream" at trial, or of congressional knowledge of such an alleged "revenue stream." *See* NR 184, Tribal Defendants' Findings of Fact.[18]

c. The Tribe was paid for the loss of all sportsmen's expenditures which hypothetically could take place on the taken area.

In any event, there is ample evidence in the legislative record that the Tribe was compensated for the wildlife resources in the taken area. *See* USB 17-18; RB 36-37. The Tribe sought $74,300 capitalized at 4% to compensate it for "this loss of wildlife resources." May 20, 1954, Hearing, *supra* at 265-266, JA 207. It is instructive that the base figure sought was *not* for the $36,600 "increase in store bills which

---

[18] No evidence of any such "revenue stream" from hunting and fishing licensing of non-Indians appears in any BIA document in the record despite the fact that the BIA studied details of Indian activity to the point of determining, for example, that the estimated expenses for production of arts and crafts in 1943 were $20. *See* Exhibit 58, p. 13. It is also noted that Ex. 93, p. 15 indicates that the Tribe sold 114 big game licenses reservation wide in 1946 for a return of $285; these licenses were sold "from appearances *exclusively to tribal members*." While the State does not concede that the record shows the sale of *any* licenses to *non-Indians*, the Ex. 93 statistics *do* show that a "revenue stream" from such sales for use on what was to become the taken area would be minuscule in comparison with the amount ultimately claimed by the Tribe for the loss of the wildlife resource. ($74,300 capitalized to $1,857,500. *See* JA 207-208.)

will result from the loss of game for food" as described by federal documents. Missouri Basin Investigation Report No. 138 at 78 (1954), PTA BB at 78, JA 193. Rather, the claim was for capitalization of more than *double* that amount ($74,300 capitalized to $1,857,500) and was based on "sportsmen's expenditures" or "*the amount sportsmen are willing to spend to bag the various species of game.*" Report No. 138, *supra* at 77-78, JA 191-192 (emphasis added). Report No. 138 speaks in general terms about these expenses, mentioning, for example, the cost of travel, equipment and hotel bills. *Id.* The tribal use of a "sportsmen's expense" amount in its demand to Congress and the Tribe's acceptance of the total settlement ultimately offered by Congress, *see* JA 265-267, preclude an argument now that it was not reimbursed for sportsmen's expenses such as licensing.[19]

The United States and the Tribe also appear to assert that Congress could not have intended to pay for licensing revenue as part of the payment for wildlife resources and land because it did not explicitly say so. This assertion falls under its own weight. Tribal President Frank Ducheneaux in 1954 testified briefly to the congressional committee that the Tribe ought to be paid for the loss of tax revenue, apparently property tax revenue, from the area to be taken for the reservoir. *See* PTA RR 205. Yet there was no separate compensation for the loss of such revenue identified in the record. Assuming the accuracy of the Tribe's argument, the Tribe still has the right either to tax the area in question or, at the very least, go to the court of claims and demand compensation for the lost tax revenues. The theory underlying the tribal argument is untenable.

---

[19] The tribal witness at the May 20, 1954, Hearing, JA 207, cited the 1951 Fish and Wildlife study which in turn was incorporated in Report No. 138, *supra*, at 78, JA 193-195.

C. The lack of post-taking activity on the taken area by the Tribe discredits its claim to jurisdiction.

1. The Tribe's post-taking activity has been minimal.

The Tribe also asserts that, after the takings, it continuously enforced hunting and fishing regulations against all hunters and fishers within the taken area. Yet the admissions of the Tribe at trial were to the contrary. Tribal President Wayne Ducheneaux admitted at trial that prior to the pendency of this litigation, there had never been a single civil or criminal action brought by the Tribe against a nonmember or non-Indian in tribal court on a hunting and fishing violation occurring at any place within the taken area. T 548-549; JA 380.[20] *See also* T 517-518, JA 374-375.

The Tribe relies upon the statement of the district court that the Tribe "prior to this lawsuit" enforced its "game and fish regulations on the lands in dispute," DCO JA 66, and represents this language as the sum and substance of the district court's findings on the issue. The Tribe thus ignores the Memorandum Opinion of the district court on December 5, 1988, in which it indicated that on three occasions tribal game wardens "have confronted non-Indian hunters presumed to be in violation of tribal hunting law. . . . " JA 16. In the first instance, a stop of a non-Indian on the taken area in 1987, the tribal officer was told by "state and federal officials" that the "Tribe lacked jurisdiction" and the non-Indian was released. JA 19 n.2. (*See also*, PHT 204-205, Exhibit 257, T 561-562.) A sale of tribal licenses to non-Indians on *fee* lands was later resolved by the refund of the license price. JA 19 n.2. These incidents, of course, undermine the Tribe's

[20] As to the Tribe's supposed assertion of jurisdiction, it is of note that, in 1983, the Tribe in its *public statement* indicated that its licenses were valid "only on tribal land." Exhibit 214, JA 282. In 1985, in a decision implemented in 1988, *see* T 527, the Tribe moved to abandon this stance and "go for total jurisdiction as far as hunting, fishing . . . " (in the words of the tribal writer). Ex. 258, JA 286.

claim that it continually exercised jurisdiction. (How the third incident was handled is not discussed.)

The trial court's view as to the enforcement of tribal jurisdiction apparently may be reduced to its finding that "[h]istorically, tribal game wardens have sought to avoid confrontation . . . by allowing non-Indians improperly hunting without a tribal license to buy the $8 sticker rather than aggressively pursuing civil charges or confiscating property." JA 17. The record, however, contains no evidence that any licenses were actually sold to a non-Indian on the taken area and no such assertion appears in the testimony of the tribal game wardens. *See* T 502 (Warden Clown); T 499 (Warden Maynard); PHT 210-212, 214-215 (Warden Rousseau).[21] In any event, the finding of the district court when read in light of the earlier opinion of the court and of the record, stands for much less than the Respondents would have this Court believe. *See* as to the low level of other tribal wildlife management, DCO JA 74.

2. The Tribe can make no claim to management of the Oahe Reservoir fishery or enforcement of regulations on the Reservoir.

The Tribe cannot claim to be involved in the management or enforcement of fishing regulations on the Missouri River itself for, at the time of trial, it had only one boat which it had taken out on the Missouri River "once" as a "demonstration." T 506-507, JA 362. The tribal witnesses, moreover, admitted that the tribe did no stocking or management on the River, T 520-521, JA 379, and that it had no plans to do so. *See* T 839-340; JA 381-382. *See also*, DCO, JA 74, 76. (The state's vigorous and highly successful activities are set out at PB 6-7. *See also* DCO JA 77-79.)[22]

[21] Warden Rousseau did testify that he had once confronted three unidentified non-Indians on Corps land who did have tribal licenses. PHT 215-216.

[22] The Tribe belittles the State's stocking of 72 million fish in the reservoir from 1970 to the time of trial in 1988, JA 78, but asks credit in

D. The Eighth Circuit erred in its application of *Dion*.

The clear language of Section X, which recognizes only a right of "access" to hunt and fish in the Tribe, together with the congressional offer and the tribal acceptance of payment for wildlife resources, indicate an "unmistakable" policy choice under *Dion* to divest the Tribe of whatever civil regulatory jurisdiction it arguably may have had over non-Indians hunting and fishing in the taken area. This view is strengthened, we would submit, by consistent federal administrative interpretation, by the vigorous actions of the State in developing the area, especially the now nationally famous fishery, and by the inactivity of the Tribe. The court of appeals thus erred in its application of *Dion*.[23]

CONCLUSION

The State respectfully requests that this Court reverse the determinations of the court of appeals.

Respectfully submitted,

MARK BARNETT*
Attorney General
JOHN P. GUHIN
Deputy Attorney General
State of South Dakota
500 E. Capitol
Pierre, South Dakota 57501-5070
(605) 773-3215

**Counsel of Record*

---

this Court for "its stocking of 20,000 walleye fingerlings" in Lake Oahe, citing an article published in a local paper November 22, 1992, seventeen days after the grant of certiorari. RB 13. The Tribe also claims credit for the acquisition of more boats and personnel in an article published even later. *Id.* The use of this extra record material by the Tribe highlights its lack of *prelitigation* activity.

[23] The State rests upon its previously made argument with regard to taken area lands acquired from non-Indians. *See* PB 47-49.